

January 25, 2006

MEMORANDUM

TO: Debbie Dietrich, Director
Office of Emergency Management

Richard D. Ossias
Office of General Counsel

FROM: Walker B. Smith, Director /s/
Office of Civil Enforcement

SUBJECT: Applicability of Clean Air Act §112(r) General Duty Clause to "Transportation and Storage Incident to Transportation"

The purpose of this memorandum is to recommend that the Agency clarify that the Clean Air Act's General Duty Clause is applicable to any facility meeting the statutory definition of "stationary source" and that the scope of its applicability is not affected by the transportation exemption that exists in 40 C.F.R. Part 68. The Office of Civil Enforcement believes that those transportation sources exempt from Part 68 are not exempt from the General Duty Clause's requirements.

Recently several Regions have asked EPA Headquarters to provide them with guidance on the applicability of Clean Air Act § 112(r)(1), the General Duty Clause, to offshore liquefied natural gas (LNG) facilities.¹ While this may appear to be a narrow issue, the Agency's answer has far reaching implications. Specifically, the Agency's response will encompass all sources that fall within the regulatory exemption for "transportation and storage incident to transportation" found in the Clean Air Act's Part 68 regulations. The implications for enforcement are particularly significant.

¹ According to a Congressional Research Service Report for Congress that analyzed both on and offshore LNG facilities, there are currently six LNG Import Terminal facilities operating in the United States. Seven more facilities have been approved, twenty-three have applied for authorization to operate, and fifteen are undergoing a feasibility study. "Liquefied Natural Gas (LNG) Import Terminals: Siting, Safety and Regulation," CRS Report for Congress, Updated April 20, 2005.

corresponding DOT regulations. The General Duty Clause requires the owner or operator of the source to identify hazards using appropriate techniques and to design and operate the facility safely. A facility's performance is gauged in comparison to similarly situated facilities, and holds an owner/operator to generally recognized standards prevailing within the industry. The DOT regulations that apply to many of the sources exempted from the requirements of Part 68 do not contain a general duty provision comparable to the provision in the Clean Air Act. In the case of offshore LNG facilities, those sources are not subject to regulation by the Coast Guard in a manner comparable to the DOT regulations.

Adoption of an interpretation that exempts "transportation and storage incident to transportation" from the application of the General Duty Clause would limit EPA's response authority in the event of an accidental or catastrophic release from a source that meets the clear terms of the statutory § 112(r)(2) definition. Furthermore, the Agency would be making an affirmative statement that these often controversial sources have no enforceable duty to be designed, operated, and maintained safely, even though the text of the statute explicitly subjects them to the Clean Air Act's authority. Such an interpretation would impact EPA's enforcement authority at any facility that is exempt from Part 68, not just LNG facilities.

There are precedents for adopting an approach that uses two different definitions of the same term – one statutory and one regulatory. For example, in the Resource Conservation and Recovery Act (RCRA) program the terms "solid waste" and "hazardous waste" are both defined differently in the statute and in the implementing regulations. As a result of this difference, the imminent and substantial endangerment order authority found in RCRA § 7003 and site investigation authority found at RCRA § 3013 can be applied to a broader set of statutory wastes than can be reached under the RCRA regulatory program in 40 CFR Parts 264/265.

RECOMMENDATION

The Office of Civil Enforcement recommends that EPA clarify that the Clean Air Act's General Duty Clause applies to all sources that meet the statutory definition of stationary source found in CAA § 112(r)(2)(C). This affirmation will reinforce FERC's conclusion, as already expressed in some EIS evaluations, and provide greater clarity to the regulated community and the public about the environmental and public health protections that govern these sources. This conclusion is legally defensible and is the best policy choice for the Agency as it maximizes our ability to respond to and prevent catastrophic releases from these facilities. Based on our prior conversations with the Office of General Counsel on similar issues and our understanding of the relevant principles of administrative law and the standard of review that would be applied to the Agency's implementing actions, we believe that if the Agency wished to maintain its General Duty Clause authority over stationary sources as defined by the Clean Air Act, it could do so with minimal legal risk.

If you have any questions regarding this Memorandum or would like to personally discuss these issues, please contact me or Rosemarie A. Kelley at (202) 564-4014.

CC: Regional Counsels, Regions I-X



The General Duty Clause

Clean Air Act Section 112(r)(1)

The General Duty Clause says: "The owners and operators of stationary sources producing, processing, handling or storing [a chemical in 40 CFR Part 68 or any other extremely hazardous substance] have a general duty [in the same manner and to the same extent as the general duty clause in the Occupational Safety and Health Act (OSHA)], to identify hazards which may result from... releases using appropriate hazard assessment techniques, to design and maintain a safe facility taking such steps as are necessary to prevent releases, and to minimize the consequences of accidental releases which do occur."

What is the General Duty Clause (GDC)?

In the Clean Air Act Amendments of 1990, Congress enacted Section 112(r)(1), also known as the General Duty Clause (GDC), which makes the owners and operators of facilities that have regulated and extremely hazardous substances responsible for ensuring that their chemicals are managed safely.

Facilities have been required to comply with GDC since November, 1990.

Who is Covered?

The General Duty Clause applies to any stationary source producing, processing, handling, or storing regulated substances or other extremely hazardous substances (EHS). Extremely hazardous substances are any chemical listed in 40 CFR Part 68, or any other chemical which may as a result of short-term exposures because of releases to the air cause death, injury or property damage due to their toxicity, reactivity, flammability, volatility or corrosivity.

What Does the General Duty Clause Involve?

Facilities subject to the General Duty

Clause are responsible for, among other things:

- knowing the hazards posed by the chemicals and assess the impacts of possible releases;
- following codes, standards and other business practices to ensure the facility is properly constructed and maintained - and the chemical is managed safely; and
- having a contingency planning process, which would involve community responders, if necessary, to aid in an adequate response in the event of an accident.

The Risk Management Program

The Risk Management Program is also part of the Agency's Section 112(r) program dedicated to recognizing hazards and preventing accidents. It differs from the GDC in that it requires facilities that use listed toxic or flammable chemicals above certain thresholds to make their hazard assessment, emergency response and prevention program information available to the public.

Meeting your GDC Obligations

It is important to understand that the General Duty Clause is not a regulation and “compliance” cannot be checked against a regulation or submission of data. GDC requires you to be continuously vigilant about hazards and their reduction. It is a continuing obligation rather than a one time reporting event.

The General Duty Clause requires you to identify the “state of practice” in your industry: what are similar businesses doing to identify hazards, design and maintain a safe facility, and minimize the consequences of accidental releases? Generally, among other things, you should:

- (1) Adopt or follow any relevant industry codes, practice or consensus standards (for the process as a whole as well as for particular chemicals or pieces of equipment).
- (2) Be aware of unique circumstances of your facility which may require a tailored accident prevention program.
- (3) Be aware of accidents and other incidents in your industry that indicate potential hazards.

Examples

- A facility installed a water-based fire suppression system in storage areas that contained water-reactive chemicals. This created a clearly hazardous condition. The General Duty Clause required the facility to install a fire suppression system that was compatible with water reactive chemicals.
- Preventing and mitigating accidental releases related to Y2K failures is a GDC obligation.

Answers to Your Questions

I don't have to report under the Risk Management Program because I lowered my thresholds - and I believe that I lowered

my risk. Am I still subject to General Duty Clause?

Yes. If you use an extremely hazardous substance in any amount you are subject to the GDC.

How can I find out what GDC inspectors are looking for at my facility?

Read the Guidance for Implementing the General Duty Clause which will be available this Summer on CEPPPO's website.

How can I find out about accidents and recognized hazards in my industry sector?

Your trade association is a good place to start. CEPPPO, OSHA and the Chemical Safety & Hazard Investigation Board periodically issue hazard bulletins and accident investigation reports. EPA also issues Chemical Safety Alerts and Enforcement Alerts on recognized hazards. EPA's Emergency Release Notification System is a useful first stop for tracking accidents.

How has OSHA's GDC been applied?

Like the GDC of the Clean Air Act, OSHA's GDC applies when: (a) an employer fails to render a workplace free of hazard; (b) the hazard is recognized either by the employer or generally within the employer's industry; (c) the hazard causes or is likely to cause death or serious harm; and (d) there are feasible means by which the employer can eliminate or materially reduce the hazard.

What are the penalties for non-compliance with the GDC?

The Clean Air Act section 113(b) allows EPA to assess penalties of up to \$27,500 per day for each violation.

For More Information on the General Duty Clause, Chemical Safety Alerts, or the Risk Management Program ...

CAA Section 112(r) Hotline
Monday - Friday, 9am - 6pm, EST
(800) 424-9346 or (703) 412-9810
CEPPPO's website: <http://www.epa.gov/ceppo>